No. 7 Orig.

By. of Hagerman, Jackson & Bryson for Respondent

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Supreme Court of the United States.

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ORIGINAL O. T. 1900.

EX-PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Brief on behalf of Respondent, William H. H. Clayton, Judge of United States Court in Indian Territory in Opposition to Demurrer to Return of Respondent.

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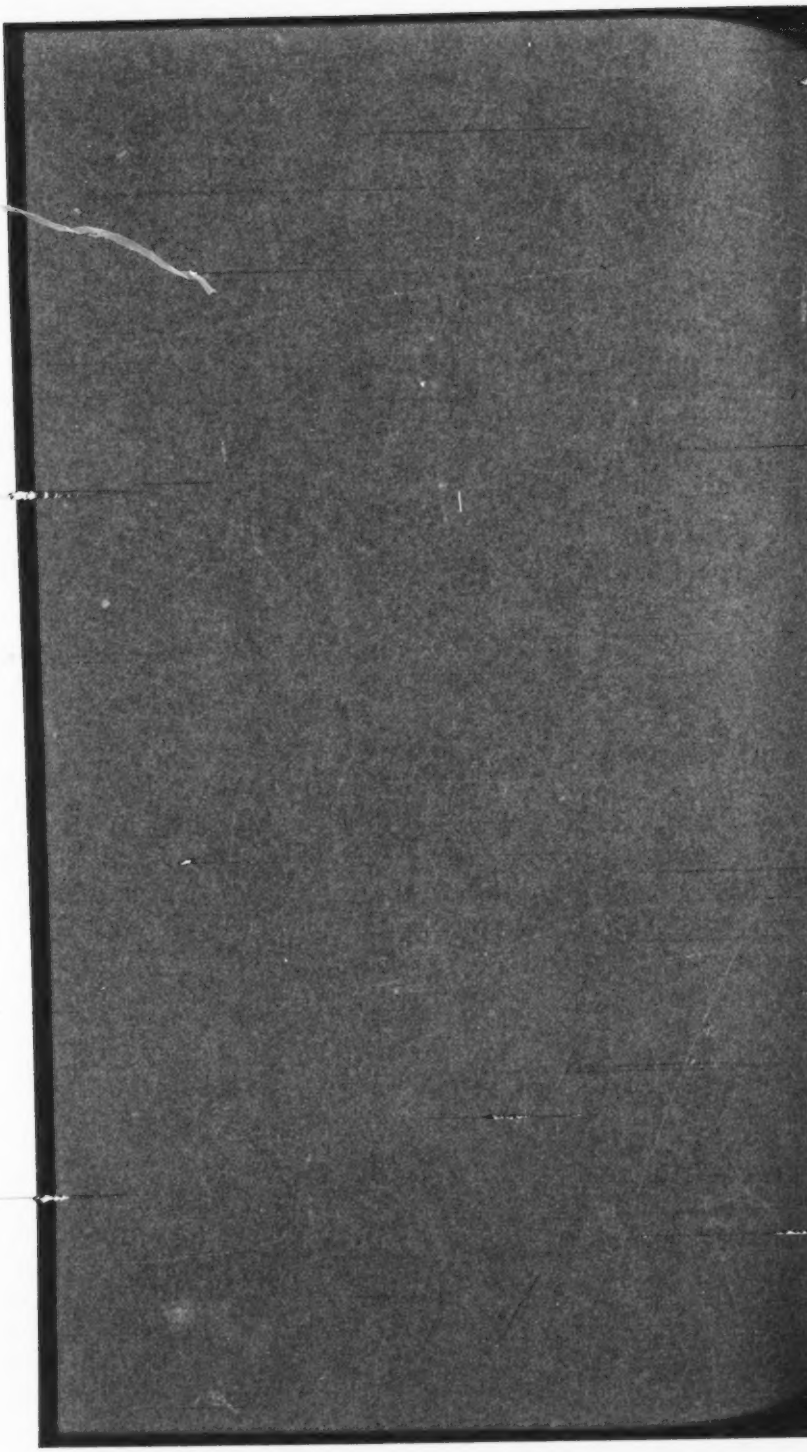

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STATEMENT.

This proceeding involves a judgment in one of five companion cases brought to recover damages growing out of a fire, alleged to have been set out by a locomotive engine operated upon the line of the Mis-

souri, Kansas & Texas Railway Company in the Indian Territory. The history of the litigation, so far as it is necessary to be stated in connection with this proceeding, is set forth in a brief way in the return of the respondent, to which the attention of this Court is respectfully directed. The judgment in controversy in this proceeding, which is known as the Fuller Case, was the first one rendered in any of these five cases; it was in favor of Orange Fuller, as assignee of Butler Brothers, and against the railway company for damages in the sum of $8,500.00 on account of property destroyed by the fire referred to. A writ of error was sued out from the United States Circuit Court of Appeals for the Eighth Circuit and the case taken there for review; the judgment of the United States District Court was affirmed by the said Circuit Court of Appeals (72 Fed. 467), and a writ of error from this Court was sued out and the case brought to this Court for review, and it bore number 16,236 upon the docket of this Court and number 146 upon the docket of the October, 1897, term of this Court, and was here affirmed by a divided court (168 U. S. 707).

While the case was pending in this Court on writ of error, the second of these five companion cases, known as the *Wilder Case*, was tried in the United States District Court for the Northern District of the Indian Territory, and at that trial a lot of new evidence was developed which materially affected the issues in the case and the jury disagreed. That case was subsequently tried on two other occasions in the United States District Court while the Fuller

Case was still pending in this Court, and a judgment was finally rendered in favor of the plaintiff, which judgment was later reversed by the United States Court of Appeals for the Indian Territory, which said Court of Appeals was not in existence when the judgment in the *Fuller Case* which is in controversy in this mandamns proceeding was rendered. The opinion of the United States Court of Appeals for the Indian Territory in the case of Missouri, Kansas & Texas Railway Company v. Wilder, is reported in 53 S. W. Rep., 490.

Upon the reversal of the *Wilder Case* the plaintiffs in it and the other three companion cases abandoned any further claim for damages and dismissed all four of the cases (Exhibits A, B, C, D, E, F, G, H, Return of Respondent).

When this new evidence developed, and while this case was so pending in this Court on said writ of error, a petition for new trial was filed in the *Fuller Case* in the lower court *within the time fixed and* in *accordance with* Section 5155 of Mansfield's Digest of the Statutes of Arkansas, adopted by Act of Congress of May 2, 1890, for the government of the United States Court in the Indian Territory, which said Act of Congress is entitled, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes."

By reason of the said additional trials of the *Wilder Case* other new evidence developed at different times which was made a part of said petition for new

trial in the Fuller Case by amended petitions subsequently filed.

The facts with reference to the proceedings for a new trial are substantially correct as set out in the brief of counsel for the petitioner herein.

ARGUMENT.

The United States Court in the Indian Territory had jurisdiction to consider and determine the petition for new trial.

For the purposes of this case, jurisdiction may be defined to be the power to hear and determine the petition for a new trial under the act of Congress relied on.

On May 2, 1890, an act of Congress was adopted, entitled, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." Section 31 of said act of Congress, so far as it affects the matters at issue in this proceeding, is as follows: —

> "Sec. 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating * * * to pleadings and practice, chapter 119."

U. S. Stat. at Large, Vol. 26, p. 94.

Among other sections found in chapter one hundred and nineteen of Mansfield's Digest of the Statutes of Arkansas governing the procedure relating to new trials is the following: —

> "Sec. 5155. Where grounds for new trial are discovered *after the term* at which the verdict or decision was rendered, the application may be made by *petition filed with the clerk*, not later than the second term after the discovery, *on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term.* The application shall *stand for hearing at the term to which the summons is returned executed*, and shall be summarily decided by the court. *The evidence may either be by depositions or by witnesses examined in court.* But no such application shall be made more than three years after the final judgment was rendered."

In all of the cases cited by counsel for petitioner no statute like this or similar to it was referred to or considered, and it is therefore respectfully submitted that such cases do not apply to the present proceeding.

A statute very similar to this, however, was construed by this Court in the case of Ex parte Russell, 13 Wall. 664, and in the case of Ex parte United States, 16 Wall. 699, where this Court held that the trial court could grant a new trial notwithstanding the mandate of this Court had been issued affirming the judgment of the trial court.

The statute there under consideration is found in the Act of Congress of June 25, 1868, 15 U. S.

Stat. at large, p. 75, the second section of which is as follows:—

> "Sec. 2. And be it further enacted, that said court of claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or otherwise) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

In the two cases last above cited this Court held that because of the provisions of the statute referred to that the Court of Claims was not bound by the rule which the counsel for petitioner seeks to invoke in this proceeding, and that the Court of Claims has jurisdiction to entertain and determine proceedings for new trials founded on newly discovered evidence without leave of this Court notwithstanding such cases may be pending in this Court on appeal, or have been decided by this Court and its mandates sent down to the said Court of Claims, and it is respectfully submitted that the same construction must be given to the Act of Congress relating to the United States Court for the Indian Territory. There are numerous States in the Union where statutes like this Arkansas statute are in

force; one of these is the State of Iowa, which has a statute as follows: —

> "Where the grounds for a new trial could not with reasonable diligence have been discovered before, but were discovered *after the term* at which the verdict, report of referee or decision was rendered or made, the application may be made *by petition filed, as in other cases, not later than the second* term after the decision on which notice shall *be served* and returned and the defendant held to *appear as in an original action.* The facts stated in the petition shall be considered as denied without answer. *The case should be tried as other cases,* by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered."

This statute was passed upon by the Supreme Court of Iowa in the case of Cook v. Smith et al., 58 Iowa, 607 (12 N. W. Rep. 617). In this case a judgment had been rendered against the defendant and an appeal taken from the Circuit Court to the Supreme Court, and while the appeal was pending the defendant discovered new evidence and filed a petition in accordance with the Iowa statute and just as the petition was filed in the case at bar in the United States Court for the Indian Territory under these Arkansas and United States statutes. An answer to such petition was filed as in this case pleading the pending appeal as a bar to the proceedings for new trial. The said Circuit Court of

Iowa sustained a demurrer to such answer and thereafter the original case was finally affirmed on appeal in the Supreme Court of Iowa and the petition for new trial subsequently brought to a hearing as was done in the case at bar.

In its opinion the Iowa Supreme Court used the following language: —

"The statute provides, where grounds for new trial cannot, with reasonable diligence, be discovered before, and are discovered after, the term at which the trial was had, an application therefor may be made by petition filed not later than the second term after the discovery; but no petition shall be filed more than one year after final judgment is rendered.

"When the petition for a new trial was filed the Circuit Court, without doubt, had jurisdiction and the power to grant a new trial upon the ground material evidence had been discovered since the trial. Did the subsequent appeal oust the Circuit Court of such jurisdiction? There is no statute which so provides. The right to apply for and the power of the court to entertain jurisdiction of the application during the time limited in the statute is absolute and unconditional. There is no such inconsistency between the two proceedings as to require the one to be abated because the other is pending. It may be both should not be actively prosecuted at the same time for determination; the determination of one may render a decision in the other unnecessary. Upon application this would no doubt be controlled by the courts. Suppose the ground upon which a new trial was asked was not discovered until after the appeal was taken on the last day allowed therefor, would such appeal de-

prive the court of the power to entertain jurisdiction of a petition for a new trial? Clearly not, we think; for during the time limited in the statute the power of the court and the right of the party is unconditional. There are cases where neither party is satisfied with the judgment below. Would an appeal by one party oust the court of the power to entertain and grant a new trial on the application of the other party? We think not."

A similar rule has been laid down by the appellate courts of New York under somewhat similar statutes. In the case of Henry v. Allen the Court of Appeals held that the fact that an appeal had been taken and was pending, did not prevent a motion being made in the trial court for a new trial on the ground of newly discovered evidence, and that while in all matters pertaining to the appeal itself, and to the proper hearing thereon, the appellate court had jurisdiction, yet as to an application or a motion for new trial, the case was still pending in the court of original jurisdiction and such application should be made to that court and not the appellate court. If the lower court sustained the motion and granted the trial, the legal effect would be the vacating of the judgment from which the appeal has been taken to the appellate court, and a motion to dismiss the appeal would then be proper.

Henry v. Allen, Court of Appeals, New York, 41 N. E., 694.

At the time this case was heard Mr. Justice Peck-

ham was a member of that court and concurred in the opinion.

In Voisin v. Commercial Mutual Ins. Co., 56 Hun, 215, it is held that the trial court may grant a motion for a new trial although final judgment may have been entered, the time to appeal therefrom expired and the judgment itself may have been enforced. This case went to the Court of Appeals of New York (123 N. Y. 120), and was affirmed. The Court of Appeals in its opinion reviewed the legislation of New York covering new trials at length, and as the statutes involved are quite numerous and set out in the opinion we will not here insert them. And however "anomalous" the result arrived at (to borrow the language of this Court in *U. S.* v. *Young*, 94 U. S. 258), that court said, page 123:—

> "It is undoubtedly competent for the legislature to limit the effect of a judgment as respects the right and mode of granting relief to an aggrieved party from any of the proceedings in the action, and where it has indicated a clear intention to protect the right of review from the effect of such judgment it is the duty of the court to give effect to the legislative intention."

So it appears to us in the case at bar, that it is the duty of this Court to give effect to the intention of Congress whatever may be the result upon a judgment which has been affirmed by this Court. It is clearly the intention of Congress that a right to a new trial should exist without regard to any former judgment and without regard to whether or not it was subsequently affirmed by an

appellate court. The section of the Arkansas law extended over the Indian Territory is just as much an *Act* of *Congress* as though it had been set out *in haec verba* in the act itself, instead of by reference. The question presented is not one of State law but of Federal law.

In Keister v. Rankin, 34 App. Div. Rep. (N. Y.) 288 it was urged that it was too late to grant a new trial after an appeal and the affirmance of a judgment but it was held that

> "It is never too late to do justice."

The same rule is also found in the following cases: —

Vernier et al. v. Knauth et al., 39 N. Y. Sup., 784;
Smith v. Matthews et al., 47 N. Y. Sup., 96;
Stokes v. Stokes, 54 N. Y. Sup., 319;
Nugent v. Met. St. Ry. Co., 61 N. Y. Sup., 476.

A similar rule under a somewhat similar statute also exists in California. In the case of Naglee v. Spencer, 60 Cal., 10, the Supreme Court of that State said: —

> "An appeal from the judgment does not affect the jurisdiction of the lower court to hear and pass upon motion for new trial."

In the case of Rayner v. Jones, 90 Cal., 78, the Supreme Court of California also held that,

> "A notice of motion for a new trial was served

in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that, as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal."

See also

Carpentier v. Williamson, 25 Cal. 167;
Chase v. Evoy, 58 Cal. 352;
McDonald v. McConkey, 57 Cal. 326.

This Arkansas statute, extended over the Indian Territory by Act of Congress, was construed by the Supreme Court of Arkansas in the case of Jacks v. Adair, 33 Ark. 161, and in the case of Hill v. Draper, 37 S. W. Rep. 574. In the case of *Jacks* v. *Adair*, it was held that the three-year period of time mentioned in the Arkansas statute above quoted, within which petitions for new trial might be filed, runs from the date of rendition of the judgment in the trial court and not from the rendition of the judgment in the Supreme Court in cases appealed to it, and it did not hold as counsel for petitioner contends that the proceedings in the appellate court must be dismissed before a petition for new trial could properly be filed in the trial court, but it is expressly held that the statute in question "extended to cases at law a new remedy" and "in

derogation of the common law principle that the judgments of the Circuit Court at law cannot be altered by the same court after the close of the term except by bill in chancery in a direct attack for fraud," and does not change the rule in equity as to bills of review.

Further it was said: "It has been well settled, however, that for matters arising after the judgment or decree of an appellate court which would render it inequitable to carry out the judgment or decree into execution it may be enjoined. That detracts nothing from the dignity or supremacy of the superior tribunal. *It presents new equities for original jurisdiction.*"

The case arose by writ of prohibition to the trial court where a motion for new trial had been filed as well as a bill in equity for an injunction, and the question of new trials at law under the statute was not discussed at length, as the case was really decided on the bill in equity. The paragraph of the opinion quoted in petitioner's original brief (p. 7) shows that the court did not undertake to decide that the pendency of an appeal *was* an obstacle to the lower court granting a new trial as stated in brief in support of demurrer to return of respondent, for the Court said: "The appeal is his own and creates the obstacle against filing the petition below *if any exists* pending the appeal." The pendency of the appeal was urged as an excuse for not filing the petition for new trial sooner. The paragraph of the court's opinion immediately preceding shows that the "*question whether the court below can entertain*

such a petition at all during the pendency of an appeal here and before the cause was remanded" was not considered. No mandate went to the lower court, but the case was retained in the Supreme Court for execution.

In the case of *Hill* v. *Draper*, *supra*, citing the case of *Jacks* v. *Adair*, *supra*, the Supreme Court of Arkansas said: —

> "In this case the Circuit Court treated a part of the decree of this court as of no effect, and upheld a sale which had been set aside by it *without any ground for review or new trial, there being no newly discovered evidence.*"

This clearly indicates that had there been grounds for a new trial on account of newly discovered evidence, and the statute in question had been invoked and a new trial granted, the action and judgment of the Supreme Court would have been entirely different.

The two opinions of this Court in *Ex parte* Russell, *supra*, and *Ex parte* United States, *supra*, as well as the decisions of those State courts where similar statutes exist, are confidently relied upon as conclusive in favor of the jurisdiction of the United States District Court in the Indian Territory to grant this new trial under the statute in question.

The counsel for petitioner cites certain opinions of this Court and other Federal courts in support of the general proposition that under the Federal prac-

tice when an appeal in equity is properly taken it removes the case and the decree therein from all supervision on the part of the court below. There is no question but that this is the correct rule as applied to the facts in those cases but it has no application in this proceeding because the foundation of the action of the United States District Court is a statute expressly authorizing the institution of a new suit or new trial without regard to any appeal or affirmance of the court's former judgment similar to the Court of Claims Act.

There is an important and controlling distinction between the filing of a motion for a new trial during the *same term* at which judgment is rendered under ordinary statutes which are found in most of the States, and the proceeding had in the lower court in this cause under Section 5155 of the Arkansas statutes extended over the Indian Territory by the act of Congress. By the same act of Congress there was also extended over the Indian Territory Sections 5153 and 5154 of the Arkansas statutes, which read as follows: —

> "Sec. 5153. The application for a new trial must be *made at the term the verdict or decision is rendered*, and, except for the cause mentioned in subdivision seven, of section 5151, shall be *within three days after the verdict* or decision was rendered, unless unavoidably prevented."

> "Sec. 5154. The application must be made by *motion*, upon written grounds, filed at the time of making the motion. The grounds mentioned in the

second, third and seventh subdivisions of section 5151 *must be sustained by affidavits* showing their truth, and may be controverted by *affidavits.*"

These two sections cover the ordinary *motion* for a new trial made at the same term. While Section 5155 provides for the granting of a new trial *after the term* at which the verdict or decision was rendered, upon *petition filed with the clerk as in other complaints, requiring the adverse party to appear and answer it on or before the next term*, and to be determined by *depositions or by witnesses examined in Court.* In a word, this latter section provides for an independent trial. Under Sections 5153 and 5154 the *motion* for a new trial is determined simply on *affidavits.* It may be conceded that had the application for the new trial been made under Sections 5153 and 5154 that the trial Court could not have acted upon or granted the same pending the appeal to this Court or the intermediate appellate court; but the reverse of this proposition is equally clear under Section 5155.

The line of distinction between these sections is clearly pointed out by this Court in its decisions construing the Court of Claims Act. The same line of distinction has been drawn in all of the States (and there are a number of them) where similar statutes exist granting the right of a new trial after the term at which the judgment or decision is rendered. This question is quite fully discussed in the Encyclopedia of Pleading and Practice, Vol. 14, Title, New Trial, where, after dis-

cussing the ordinary motion at term time, it is said (p. 949): —

> "The codes provide in substance that when the grounds for a new trial could not with reasonable diligence have been discovered before but are discovered *after the term* at which the judgment is entered, the application may be by *petition filed as in other cases.* The remedy thus provided is in the nature of a bill in equity for a new trial on the ground of newly discovered evidence, and supersedes such remedy."

And further along it is said in this work that (p. 953):—

> "The codes generally provide that the *petition* for "new trial must be made not later than the *second* "*term after the discovery* of the ground for the new "trial, and not later than *one, two or three* years after "the judgment attacked, otherwise the petition will "be dismissed. *The petition may be filed pending an* "*appeal.*"

It is further shown by the text in this work that upon a petition being filed under a statute of this kind, the court procedes as in ordinary cases, process issues, service made a demurrer may be filed, an answer may be filed, and a hearing had upon testimony in open court. In none of these particulars is a proceeding of this kind in any way akin to the ordinary motion of a new trial filed at the same term at which the judgment or decision is rendered.

The distinction is more clearly shown between

these two forms of proceeding by the fact that where a new trial is refused or granted *after term time* under a statute of this kind, an appeal lies; but where the ordinary motion for a new trial at the same term is refused or granted, no appeal lies from the decision of the court thereon. In the one case it is a final decision of a cause, and in the other, the mere discretionary action of the Court upon an interlocutory motion.

In Nebraska, there are similar statutes to the Arkansas law, extended over the Indian Territory as aforesaid by act of Congress, and it is held that an order setting aside a verdict of the jury and granting a new trial during the term at which the verdict is returned and before judgment, is not a final order and is not reviewable by proceedings in error (Artman v. West Point Mfg. Co., 16 Neb. 572); while, on the contrary, it has been repeatedly held in that State that error will lie from a judgment granting a new trial on proceedings commenced after the adjournment of the term on the ground of newly discovered evidence. Iler v. Darnell, 5 Neb. 192; Axtell v. Warden, 7 Neb. 186; Kruger v. Adams, 9 Neb. 526; Johnson v. Parrotte, 34 Neb. 26.

A similar distinction has been made in Indiana, where new trials may be granted either at term time or thereafter, as under the Arkansas law. In Hines v. Driver, 89 Ind. 339, the Supreme Court said: —

> "Much of the apparent conflict between the cases referred to in argument has arisen from a failure

to observe the essential difference between an application for a *new trial made during the term* and an *independent proceeding* to obtain *a new trial instituted after the close of the term*. In the first case the order which disposes of the application is only an interlocutory order, subject to the control of the court until final judgment and only capable of being reviewed in connection with other proceedings in a cause in which it is made. In the latter case the proceeding being an independent one and having but a single object in view, the order which makes a final disposition of the cause is necessarily a final order and hence a final judgment within the meaning of section 632 of the civil code."

The ordinary motion for new trial at term time rests in the sound discretion of the court and is not subject to review. Armstrong v. State, 54 Ark. 364.

But it is clear under the decisions above that an appeal lies from the judgment or order on a *petition* for new trial under the statute in question.

In First Nat'l Bank v. Murdough, 40 Ia., 26, the same distinction is made between *motions* for new trials at term time and *petition* therefor after term time — the latter being an independent action.

In Sanders v. Loy, 45 Ind. 229 (approved in Kitch v. Oatis, 79 Ind. 96), it is said: —

"The application (for new trial), *when made after judgment and at a subsequent term of the court, must, as we have seen, be regarded as an independent proceeding*, and must set out the issues upon the former

trial and the evidence given on such trial, with the newly discovered evidence. *An issue must be formed on the complaint, and the issue thus formed must be tried by the court.* Upon such trial the plaintiff should introduce in evidence the record of the former trial, prove what the evidence was upon such trial, the newly discovered evidence, and show that it had been discovered since the term when the case was formerly tried, and what diligence he had used to discover the evidence before the former trial. The defendant should in like manner introduce his evidence orally before the court. If the new trial is refused, the party appealing to this court should put into the record by a bill of exceptions all the evidence, documentary and oral, which was offered and considered by the court in the application for a new trial."

Section 572, Statutes of Indiana (Burns, 1894) is substantially like the statute in question. Preceding sections provide the usual grounds for new trials at same term and this section covers new trials after term.

In Sanders v. Loy, 45 Ind. 230, *supra*, new trials *after term* are strikingly distinguished from those at term. It is said: —

"When the application is made after the term by a complaint the proceeding is a new and independent one and cannot be fastened on the former proceedings which had already resulted in a judgment and was no longer pending in court."

In Harry v. Fink, 111 Ind. 254, it is said that a

complaint for a new trial under statutes of this kind "*constitute a separate and distinct action* and the ultimate result reached through such proceedings constitute a final judgment from which an appeal may be prosecuted to this court."

The distinction between new trials at term time and those granted after term time is nowhere more clearly drawn than in Hill v. Roach, 72 Ind. 58, where that court said: —

> "It is unquestionably true that in this State a complaint for the review of a judgment for error of law in the proceedings will not lie after the judgment has been affirmed upon an appeal to this court, but we know of nothing either in principle or based upon authority which can be properly construed to prevent the prosecution of a complaint for review as in this case for material new matter after the judgment has been affirmed by this court upon an appeal involving only supposed errors of law in the proceeding below provided the *complaint* is filed within the time limited for the commencement of such action. Davis *v.* Binford, 70 Ind. 44; Indiana Ins. Co. *v.* Routledge, 7 Ind. 25; Southard *v.* Russell, 16 How. 547, 570; Kinsell *v.* Feldman, 28 Iowa, 497; Stafford *v.* Bryan, 2 Paige, 45; Dennison *v.* Goehring, 6 Pa. St. 402."

The Nebraska statute above referred to is very similar to the statute in question (§ 4839, Consolidated Statutes of Neb., 1893, Cobbey), and the lower court can grant a new trial, notwithstanding the affirmance of its original judgment on appeal. O. N. & B. H. Ry. v. O'Donnell, 24 Neb. 753.

In Kentucky there is a statute exactly like the

Arkansas statute, except that there is a proviso in Kentucky law that it shall not apply to divorce cases (§ 343, Kentucky Code, 1888, Carroll). We think it clear that the Kentucky statute was adopted by Arkansas (Jacks v. Adair, *ubi supra*), and under the Kentucky statute trial courts grant new trials, notwithstanding appeal and affirmance of former judgment.

Scott v. Scott, 82 Ky. 328.

L. & M. Ry. v. Whitley County Court, 38 S. W. 678.

In Ohio there is a statute exactly like the Arkansas statute (Sec. 5309, Bates Anno. Stats. 1897).

In Moores v. Coates, 35 Ohio St. 185, it is said:—

"A party may obtain a new trial upon *motion* but the motion must be filed *during* and not after the term at which the verdict, report or decision is rendered. Civil Code, § 299. Where the grounds are discovered subsequently to the term when the verdict, report, * * * or decision was * * * rendered" relief can only be had by *petition*, § 301. A *motion*, ordinarily in the briefest terms, may be and usually is heard in a summary manner upon ex parte affidavits, while a *petition* is a substitute for the remedy by bill in equity for a new trial on the grounds of newly discovered evidence (Stevens *v.* Hey, 15 Ohio, 313; Brown *v.* Luehrs, 79 Ill. 575; Hilliard on New Trial, 2d ed. 604; 2 Nash's Pr. 1048) though on the one hand the remedy is broader than by bill in equity and on the other hand, section 301 may not provide for all the cases in which relief may be had where the principal ground is newly discovered evidence."

In Myers v. Myers, 6 Oh. St. 227, it is held that petition should be filed in trial court and that no *permission* from court is necessary — that it is a matter of right under the statute.

In Kansas* there is a statute exactly like the statute in question (§ 310, Civil Code, R. S. Kan. 1897), and in that State the lower courts grant new trials though their former judgments have been affirmed by the Supreme Court.

Soper v. Medbury, 24 Kan. 135;
Gottleib v. Jasper & Co., 27 Kan. 773.

In the latter case the distinction between *motions* for new trials at same term and *petition* for new trial *after term* time is clearly drawn and Sanders v. Loy, 45 Ind. 229, and Moore v. Coates, 35 Oh. St. followed and held that

> "This petition for a new trial although instituted
> "merely for the purpose of obtaining a new trial in
> "an action to which it is merely an incident may also
> "in one sense be called an action itself and a new and
> "independent action and so far as it is a new and in-
> "dependent action we suppose it should be governed
> "by the rules of procedure governing other actions."

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* Where the grounds for a new trial could not with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after discovery; on which a summons shall issue, be returnable and served, or publication made, as prescribed in section seventy-four. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered. (§ 310 Kan. Civ. Code.)

The statutes of Indiana, Ohio, Kentucky, Iowa, and Nebraska above referred to are one and all like this Arkansas statute and this Kansas statute. They differ only in the time limitation. Some provide *one* others *two* and others *three* years after final judgment as the limit for filing of such petitions.

This case also holds that an appeal lies from order or judgment on such a petition while in Kansas as elsewhere the court's action on an ordinary motion at term time is a matter of sound discretion and not reviewable.

These cases were followed by the Supreme Court of Kansas during the time Mr. Justice Brewer was a member of that court.

Conroy v. Perry, 26 Kan. 473;
Sexton v. Lamb, 27 Kan. 432;
Duffitt v. Crozier, Judge, 30 Kan. 150.

In the former two the opinions were written by Mr. Justice Brewer, and in the latter case he wrote a concurring opinion. In all of them it is held that under the Kansas statute the trial court can grant a new trial on grounds of newly discovered evidence, notwithstanding the affirmance of its former judgment on appeal, and in the latter it is expressly held that no application to the Supreme Court for leave to file is necessary. In the course of that opinion Judge Brewer said: —

"I see no reason to doubt the power (to grant "a new trial), neither do I understand my associ- "ates as questioning its existence. In a certain sense "the judgment in this court is an end of the liti- "gation. So, also, it may be said that any judg- "ment is an end of the litigation. It is a finality, "and yet not absolutely final. Take a judgment "in the District Court (trial court), when it "is once entered there is said to be a final "adjudication. Neither party can come into court "and by simply saying he has more or differ-

"ent testimony have the judgment set aside "and the matters in issue relitigated. The reply to "such an application would be, you are too late — the "matter is at an end. And yet every lawyer knows "that such a judgment is not absolutely final even in "that court. By motion or petition a reinvestigation "may be had within days or even months thereafter "and the statute provides within what time and upon "what conditions such further relief may be had. "(Civil Code, §§ 306–310; Sexton *v.* Lamb, 27 Kan. "432.) Now I suppose that when a mandate goes "back from this court directing the entry of a judg- "ment the judgment should be entered in conformity "therewith. *But even then* upon proper petition and "showing further proceedings may be had, the judg- "ment opened up and the issues relitigated. But this "cannot be done upon the mere application of a party. "That would make the judgment of the appellate less "of a finality than that of a trial court. There must "be a showing of new facts or newly discovered "testimony such as would make an opening up of "the judgment and a re-examination justifiable and "such application must in the first instance be made "to the District and not to this court."

In the first appeal of this case (Duffitt v. Tuhan, 28 Kan. 292) a mandate of the Supreme Court was sent to the court below directing it to enter judgment upon the findings of fact in favor of the plaintiff. Plaintiff presented the mandate and asked that judgment be entered accordingly but the defendant moved for a new trial.

In Wisconsin a very similar statute was before the court in the case of State ex rel. Turner v. Circuit Court of Ozaukee County, 71 Wis. 595, and it

was held that the trial court could grant a new trial notwithstanding the affirmance of its former judgment in the Supreme Court of that State. It was held:—

"The town of Saukville was indicted for not repairing a bridge, and was found guilty. A motion was made to set aside the verdict, and for a new trial, which motion was denied, and the defendant town was sentenced to pay a fine of $250. The cause was then brought to this court on a writ of error, and the judgment of the Circuit Court was affirmed. On the return of the record to the Circuit Court, the defendant made a motion, founded upon a petition and affidavits for a new trial, which motion was granted. A common-law writ of *certiorari* was then issued from this court to review the order of the Circuit Court granting a new trial. A motion is now made to quash the writ because it was improvidently granted, and that motion is the matter to be considered. The rule is well settled in this court that the only question arising on the motion is the question of jurisdiction. Where the writ issues to review the proceedings of a court, that is the only question which will be examined, though it is otherwise when it issues to review the proceedings of officers or bodies not proceeding according to the common law. It is not necessary to cite our decisions where these principles have been adjudicated and settled. Had, then, the Circuit Court power or jurisdiction to grant a new trial in this cause? For the purposes of the case, jurisdiction may be defined to be the power to hear and determine the cause or controversy before the court, or the power to grant the motion for a new trial. See Wanzer *v.* Howland, 10 Wis. 16; Pollard *v.* Wegener, 13 Wis. 510; Arnold *v.* Booth, 14 Wis. 180; Hauser *v.* State

33 Wis. 678. Section 4719, Rev. St., reads as follows: 'The Circuit Court may at the term in which the trial of any indictment or information shall be had, *or within one year thereafter, and in either case, before or after judgment*, on the petition or motion in writing of the defendant, grant a new trial for any cause, for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms as the court may direct.' It appears that a proper motion was made *within one year from the judgment*, upon the grounds addressed to the discretion of the Circuit Court, and a new trial was undoubtedly granted under the special authority conferred by the above statute; and the question now is, had the court power to grant it? *We can only consider the question of the power or jurisdiction of the court in the matter, not whether it exercised that power wisely or granted the motion on insufficient grounds, for the court may have erred, but error does not affect its jurisdiction.* This statute was probably borrowed from Massachusetts. See Rev. St. Mass. 1882, c. 114, § 128; Com. *v.* Peck, 1 Metc. 428; Com. *v.* McElhaney, 111 Mass. 439; Com. *v.* Scott, 123 Mass. 418. Also Ter. St. Wis., p. 377, § 6; Rev. St. 1849, § 6, c. 149; Rev. St. 1858, § 6, c. 180. *We do not well see upon what grounds the power of the court to grant the new trial can be denied if the provision is valid. The fact that the judgment has been affirmed by this court furnishes no sufficient reason for denying that power. It is said by the affirmance of the judgment it became a finality, a final determination of the cause and sentence of the law. That view would certainly be correct had not the legislature conferred this special authority to grant a new trial upon a proper cause shown.* On affirmance of a judgment in a civil case no new trial could be granted unless the statute authorized it. It is only

where the statute does authorize it can a new trial after affirmance be granted, either in a civil or criminal cause. In actions of ejectment the court can grant a new trial even after affirmance by this court, and this by virtue of a statute upon the subject. Haseltine *v.* Simpson, 61 Wis. 427; 21 N. W. Rep. 299. Consequently we can perceive of no sufficient grounds or reasons for denying the validity of the statute to grant a new trial after judgment has been affirmed in this court, any more in a criminal than in a civil cause."

It will be noted from the cases cited that a similar decision was made in Massachusetts under a like statute, the opinion having been written by Chief Justice Shaw. Com. v. McElhaney, 111 Mass. 439.

It is argued by counsel for petitioner that where a decree in equity has been affirmed on appeal a bill of review on grounds of newly discovered evidence can only be filed by leave of the appellate court and that therefore such a practice must govern the granting of new trials at law under the statute in question. We submit that such an argument is not even persuasive, much less controlling. That statute is clear and simple and contemplates no such action. It confers the right without let or hindrance — it is a statutory grant. As said by the courts of Ohio, it is a matter of right and not of leave. It is a new suit, begun as other *actions*, by the filing of a petition, service of summons on the defendant, filing of answer or other plea, a hearing upon testimony in open court, etc. It grows out of the former suit, it is true, but is entirely independent thereof. The meaning of the statute clearly is that the

lower court has lost jurisdiction of the original cause and of the parties with the expiration of the term of court at which the judgment was rendered; that the judgment whether unappealed from or affirmed is a finality so far as that suit is concerned and neither the lower court nor the appellate court have longer any control of that cause or the parties. The lower court cannot change its former judgment whether unappealed from or affirmed, and only regains jurisdiction of the parties by the filing of a new suit and the issuance and service of its process.

The practice in equity in Arkansas and in nearly all the other State courts is not as stated by the opposing counsel. The prevailing practice being for the *trial court* and not the *appellate* court to grant leave to file bills of review on grounds of newly discovered evidence.

Webster v. Diamond, 36 Ark. 538;
Jacks v. Adair, 33 Ark. 161;
3 Am. & Eng. Ency. P. & Pr. 574.

It is true that in the Federal courts the practice, founded on a *dictum* in Southard v. Russell, 16 How. 547, has generally been the reverse. That *dictum* was apparently based on a misapprehension of the English rule.

Putnam v. Clark, 35 N. J. Eq. 145;
Story Eq. Pl. 418;
Mit. & Tyler Eq. Pl. & Pr. 781;
Adams Eq. 416.

In Putnam v. Clark, 35 N. J. Eq. 145, it was held: —

"This is an application to this Court, by petition, "for leave to file a bill of review on the ground of "newly discovered facts, in a cause which was decided "here in 1880, on appeal from the final decree of the "Chancellor dismissing the complainant's bill. By "the decree of this Court that decree was affirmed and "the record remitted. There is, therefore, no record "here now. In my judgment, the application cannot "be entertained in this Court, but must be made in "the Court of Chancery. It is urged, however, that "in Jewett *v.* Dringer, 4 Stew. Eq. 586, where such "an application, on the ground of fraud and newly "discovered evidence, was made to that Court after "reversal of the decree on appeal, it was held that it "would not entertain an application to file a bill of "review, to revise its decision after that decision had "been passed upon by this Court. That view has, "indeed, the countenance of the opinion of Chancellor "Walworth, in Stafford *v.* Bryan, 2 Paige, 45, a case "cited in the vice-chancellor's opinion in Jewett *v.* "Dringer, and of the Supreme Court of the United "States in Southard *v.* Russell, 16 How. 547. In the "latter case, the Court distinctly said that a bill of "review will not lie in the case of newly discovered "evidence after the publication or decree where a "decision has taken place on appeal, unless the right "is reserved in the decree of the Appellate Court, or "permission be given on an application to that Court, "directly, for the purpose. But it will be found "that those decisions have neither the authority of "the books, nor of adjudged cases for their support. "The court of chancery has inherent power, without

" the consent of the appellate tribunal, to review, on
" the ground of newly-discovered evidence, its decree,
" though it has been passed upon on appeal, and no
" principle or practice requires that it shall refrain from
" doing so until the consent or countenance of the superior
" court shall have been obtained. These propositions
" are established by the following citations: Needles
" *v.* Kendall, Cas. temp. Finch, 468; Mitf. Pl. 88;
" Cooper's Pl. 92; 2 Dan. Ch. Pr. 1579; Story Eq.
" Pl. §§ 408, 418; 2 Hoff. Ch. Pr. 12; Tommey *v.*
" White, 1 H. of L. Cas. 160; Flower *v.* Lloyd, L. R.
" (6 Ch. Div.) 227; Haskell *v.* Raoul, 1 McCord's
" Ch. 22; Perkins *v.* Lang, reported in a note to that
" case, and McCall *v.* Graham, 1 Hen. & Munf. 13.
" It must be borne in mind that there is a distinction
" in practice between an application for a review on
" the ground of error on the face of the decree, and
" one based on newly-discovered evidence. In the
" former, no bill of review can be filed after the de-
" cree has been passed upon by the appellate tribunal,
" but in the latter it is otherwise. 'Where a decree,'
" says Judge Story, 'has been affirmed in parliament,
" it may well be doubted whether a bill of review for
" errors, apparent upon the face of the decree, can
" be brought; for the highest appellate court has pro-
" nounced, in effect, that it is not erroneous. The
" same objection does not apply where the bill of review
" is for matter of newly-discovered evidence.' In the
" ancient case of Needles *v.* Kendall, cited above, there
" was a bill of review, apparently for newly-discovered
" facts, after a decision of the cause on appeal, and it is
" evident, from the report, that no leave of the appel-
" late court was deemed necessary. In the recent case
" of Flower *v.* Lloyd, L. R. (6 Ch. Div.) 297 (1877),
" the plaintiffs obtained a judgment which was reversed

"on appeal.' After the order on appeal was passed "and entered, the plaintiffs applied to the appellate "court to have the appeal reheard with new evidence. "It was held that that court had no jurisdiction to "rehear the appeal. Sir George Jessel, M. R., "speaking on the subject of the practice, said, "'There was another totally different class of cases, "where you discovered subsequent matter which "showed that the decree was wrong, although there "had been no fraud in obtaining it. That was called a "supplemental bill, in the nature of a bill of review, "which brought the new matter forward, and again "enabled the court to do justice and get rid of the "original decree. That always required leave. Now, "that being so, supposing the court of appeal has no "jurisdiction to do what it now asked, there would "be means of obtaining justice by an original action, "which either would or would not require the leave of "the court according to circumstances. But the leave "to be given when required, was always to be ob- "tained from the court in which the bill was filed, or "in which the action had been brought.' As before "stated, it was held in that case that the appellate "tribunal (the Court of Appeal, under the judicature "act) having once determined the appeal, had no "further jurisdiction.

* * * * * * * * * *

"Upon the two cases above mentioned as holding "the contrary doctrine, Stafford *v.* Bryan, decided by "Chancellor Walworth, and Southard *v.* Russell, de- "cided by the Supreme Court of the United States, it "may be remarked that in the first, the bill was dis- "missed and the complainant appealed. Pending the "appeal, he, having obtained newly-discovered evi- "dence, applied to the appellate court to stay the

"hearing in that court until he could apply to the "court below for leave to file a supplemental bill in "the nature of a bill of review, to obtain the benefit "of the newly-discovered evidence. This was refused "and the decree affirmed. On the filing of the "*remittitur*, the motion for leave to file a bill of review "was made in the court of chancery, so that the very "application passed upon in the court below had been "unsuccessfully made in the court of appeal. In the "*other case no objection was made by counsel, on the* "*ground that the bill of review had been filed without* "*leave of the appellate tribunal, but that objection was* "*suggested by the court itself, after it had disposed* "*of the cause on the merits. The point was not* "*discussed by counsel.* The application under con-"sideration is denied, with costs."

And while the Federal courts have generally followed the dictum, it has only been in form.

Seymour v. White County, 92 Fed. 115.

In this case it was said leave should be granted as a "matter of course." See also Franklin Bank v. Taylor, 53 Fed. 865.

In Ricker v. Powell, 100 U. S. 104, the Circuit Court of the United States for the Southern District of Illinois entertained an application for leave to file bill of review in that court notwithstanding its decree had been affirmed in this court. Mr. Chief Justice Waite wrote the opinion and no question was made as to the propriety of the lower court entertaining the application and its refusal to grant leave was approved "without intending to decide

that an appeal will lie to this court from an order of the Circuit Court refusing leave to file a bill of review for newly discovered matter."

But, as we have stated, the rule in equity, as to bills of review, whatever it is, cannot be read into the statute in question as a *proviso*, and the cases relied on by petitioner are not in point.

Counsel for petitioner begins his argument thus: "In discussing the legal questions involved in this case, it is well in the outset to distinguish between the practice in common law cases and that prevailing in equity cases." This rule is a very good one and if it had been observed counsel would have omitted from his brief every *case in this court* which he cites and relies upon, for they are all cases in equity and not one of them involved the construction of statutes governing the granting of new trials at law after term time, such as the statute now before the court. Can it be seriously contended that this court or any appellate court can, in the absence of a statute, any more than a lower court, in actions at law, open its judgments and grant a new trial after term time, or by its consent or leave confer authority on the lower court to do so? If not, then, within the four walls of the statute in question must be found the authority and the sole authority for the trial court to grant a new trial.

The remedy provided by the statute before the court, instead of being in the nature of a bill of *review* in equity, is more akin to an *original* bill in equity to enjoin a judgment at law, as it gives to the lower law courts the same authority to va-

cate their judgments after term time that courts of equity previously exercised. The remedy provided by this statute is a new action, just as an original bill in equity, and is not a review in the same case. This jurisdiction of courts of equity to enjoin the execution of judgments at law is an ancient one (1st Black on Judgments, Sec. 356). And these code provisions giving to courts of law a similar power after the expiration of the term at which the judgment was rendered is simply carrying out the modern policy of simplifying judicial remedies. (§ 836 Pom. Eq. Jur.) Original bills in equity lie on grounds of newly discovered evidence (1st Black on Judgments, Sec. 386). No consent of the trial court, or the appellate court which may have affirmed the decree, is necessary (Brown v. Walker, 84 Fed. 532 and cases cited). It is a new and independent action, just as the remedy provided by the statute in question. This statutory remedy of vacating judgments by new trial supplants the obsolete remedies at common law by *audita querela* (1st Black on Judgments, Sec. 299). And by error, *coram nobis* (Sec. 300 Id.). In equity, where it is sought to enjoin a judgment at law, the party seeking relief must first have exhausted his remedy by appeal in the original action (1st Black on Judgments, Sec. 363). And as an appeal was a prerequisite to a right of relief by original bill in equity, so under the statute the pendency of an appeal can be no obstacle to the granting of the relief under the statute.

In Ex parte Russell, this court very properly

observed, in construing a statute of this kind, that the permission given the trial court to grant a new trial on newly discovered evidence after term did not amount to an *appeal from the decision of this court.* It was said: —

> "It has been objected that the granting of a new trial after a decision by this court is in effect an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us; but it is not. A new case must be made. A case involving fraud or other wrong upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud. We are of the opinion, therefore, that the court of claims had jurisdiction to grant a new trial notwithstanding the filing of the mandate of this court."

In Belknap v. U. S., 150 U. S. 590, this court, in construing the Court of Claims statute, further held that a new trial might be granted at a term subsequent to that at which the judgment is rendered, if within the two years; and took occasion to point out the difference between new trials after term time under a statute of this kind and an ordinary motion for new trial at same term. The court said: —

> "On the 2d of June, 1884, the Court of Claims sustained the motion, and granted a new trial. Of this appellant complains. As the new trial was granted at a term subsequent to that at which the original judgment was rendered (the terms of the Court of Claims beginning on the first Monday in

December in each year, Rev. Stat. § 1052), there would ordinarily be no power in the court to grant such new trial. Coughlin *v.* District of Columbia, 106 U. S. 7; Brooks *v.* Railroad Company, 102 U. S. 107. But there is in the Revised Statutes a peculiar provision, applicable only to the Court of Claims, which is as follows: —

"'Sec. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.'"

"*In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years.*"

So, we say in the case at bar, in order to give full effect to the statute in question the trial court must have power to grant a new trial notwithstanding its former judgment or the affirmance thereof for it explicitly provides that a new trial may be granted at any time within three years after final judgment. There is no exception express or implied as to cases appealed or judgments affirmed just as there was no limitation in the Court of Claims Act, limiting mo-

tions to the term. The writ of error in the case at bar had to be taken much within the limits provided for granting a new trial. No reasons are apparent why an *affirmed* judgment should have any higher sanctity as against a *new trial* on *newly discovered evidence*, discovered after the term than any other judgment. An affirmed judgment on the case made and the record becomes a *judicial verity* just the same as a judgment unappealed from and neither should prevent *a new trial on new evidence* when expressly provided for by statute. It will be borne in mind that the judgment of the trial court in this case really stood *ex proprio vigore* — this court having been equally divided.

In Durant v. Essex Co., 7 Wall. 112, it was held: —

> "In cases of appeal or writ of error in this court the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment or decree be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. *The judgment of the court below, therefore, stands in full force.* It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity *with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.*"

The court further held that where judgments are

affirmed in this manner the decision is no authority in other cases of like character.

In U. S. v. Young, 94 U. S. 258, it is held that when the Court of Claims grants a new trial under the act of Congress in question, and while an appeal therefrom is pending in this Court, the judgment is vacated and the Court of Claims resumes control of the case and the parties. This Court said: —

> "The Court of Claims, by granting a new trial, has resumed control of the case and the parties. This it had the right to do. Such a power may be somewhat anomalous, but it is expressly given, and every person when he submits himself to the jurisdiction of that court for the prosecution of his claim submits himself to its operation. The proceedings under which the new trial was obtained are now a part of the record below, and after judgment is finally rendered may be brought here by appeal for review."

If the lower court erred in granting a new trial it can be reviewed on appeal here, but it cannot control the lower court's action in the first instance by prohibition or mandamus.

The counsel for petitioner fear that when this Court has read the return of this respondent, it will agree with him that,

> "The original judgment in the Orange Fuller case was also a great injustice and wrongfully obtained and had the actual truth been fully known and not purposely concealed that the judgment in the Orange Fuller case would not have been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit

or this Honorable Court, and * * * that a greater injustice and wrong would be done by permitting the plaintiffs in this said Orange Fuller case to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light,"

and be satisfied that the respondent, as Judge of the said United States District Court acted in good faith, as stated by him in his return, and had,

"At no time been disposed to disregard the mandate of this Honorable Court in this Orange Fuller case, but by reason of the great hardships of the judgment in the said Orange-Fuller case, and by the peculiar statute extended over the Indian Territory covering the procedure in this case, which in fact is really not a motion for a new trial, but an independent statutory action, unlike the statutes prevailing in any other jurisdiction of the United States save in the District of Columbia relating to the court of claims * * * where it has been held that notwithstanding an appeal to a higher court, or a mandate from a higher court that new trials must be granted in such cases as the one at bar, your respondent felt constrained without intending any discourtesy to this Honorable Court or any disregard or discourtesy to its mandate to enter the order complained of in this case, and which order your respondent is perfectly willing to set aside should it seem meet and proper to this Honorable Court that such should be done,"

and that an injustice was sought to be accomplished by the writ of mandamus prayed for in this petition

and would, if it held that the new trial had been improperly granted, now enter an order such as entered in the case of In re Potts, 166 U. S. 63, wherein it stated: —

> "Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this court to be its manifest meaning and effect.
>
> "Upon the question whether an application for leave to file petition for a rehearing in the Circuit Court could and should be entertained by this court at the present stage of the case, no opinion is expressed, because no such application has been made.
>
> "Unless such an application shall be made to this court within twenty days, and shall upon consideration be granted by this court, an order will be entered that the writ of mandamus issue as prayed for."

In view of this language in this last mentioned opinion of this Court the counsel for petitioner argue that it is now too late for a petition for a new trial to be filed because the three-year period, fixed by the statute above referred to and extended over the Indian Territory, by Act of Congress, has lapsed, but counsel overlook the fact that there is a wide distinction between the filing of a petition for a new trial and the granting of such petition. The petition was filed within the time prescribed by the statute. There is no time limitation upon this court as to its power to now grant the respondent the privilege to grant a new trial. (In re Gamewell Fire Alarm Tel. Co., 73 Fed. 911.)

If this Court's permission is requisite to the granting of a new trial notwithstanding the statute, then no time limitations in the statute would seem to control its discretion.

Even though this Court should hold that the defendant could not *file* its petition for a new trial without this Court's permission, the time for filing as fixed by the statute has not lapsed. When this statute of Arkansas was made a part of the statutes of the United States in force in the Indian Territory this Court had already laid down a rule of construction as to when the period of time would expire for filing the petition for new trial under such statutes.

In the case of Ex parte Russell this Court held that the two years fixed by a similar Federal statute covering the Court of Claims did not begin to run until the case had been passed upon by the United States Supreme Court and it is not to be assumed that the opinion of this Court will now yield to an opinion of the Supreme Court of Arkansas as to the construction of a like statute as such course would result in conflicting constructions by this Court of similar acts of Congress. Besides, by the same act of Congress there was extended over the Territory of Oklahoma, that section of the statutes of Nebraska hereinabove referred to granting to trial courts the right to entertain petitions for new trials after term time. And we have shown that the courts of Nebraska hold that such new trials may be granted notwithstanding the affirmance of the former judgments by the appellate courts. It would certainly be an anomalous

condition should one rule of construction apply in cases coming to this Court from Oklahoma and an exactly opposite rule to those cases coming from the Indian Territory. It would also violate the rule laid down by this Court in the case of Burgess v. Seligman, 107 U. S. 20, in which it was held that ordinarily this Court will follow the construction of State statutes by State courts where such constructions of the State courts have been made previous to the question of the constructions of such statutes being raised in this Court, but that where this Court or one of the lower Federal courts, had already construed the statute prior to construction of same by the State court, then such construction by this Court or some lower Federal court must prevail as against the different construction on the part of the State court. The construction of this statute in the case of Jacks v. Adair, *supra*, by the Supreme Court of Arkansas was subsequent in time to the construction of a similar statute by this Court in the case of Ex parte Russell, *supra*.

The motion for new trial having been filed within the time provided by the Act of Congress, no consideration of justice would seem to require this Court to now withhold its consent to the lower court to now pass upon it, if such consent is or was necessary.

The defendant in the judgment which is sought to be enforced by the writ of mandamus prayed for in this petition acted in good faith with the light it had before it in filing the petition for new trial, and it is

respectfully submitted that such action was proper in view of the statute above referred to in force in the Indian Territory, and in view of the opinions of this Court and the opinions of the State courts hereinabove referred to construing like statutes. It is confidently believed that this Court will hold that this is not a proper case for a writ of mandamus as prayed for but will hold that the rule laid down by this Court in the case of Ex parte Russell, *supra*, as well as the later cases of Belknap v. U. S., 150 U. S. 590, and U. S. v. Young, 94 U. S. 258, and in the case of Ex parte United States, *supra*, apply and control.

If, however, in the opinion of this Court, the rule as laid down in the case of In re Potts and other cases to the effect that applications for leave to file or hear a bill of review must have been made to this Court, and such leave granted applies in this case, then this Court is asked to hold that the period of time within which such petition must be filed in the lower court only commences to run at the time fixed by this Court in its opinion in the case In re Russell, *supra*, which is the determination of the case on writ of error in this Court, and not at the time of the rendering of the original judgment in the trial court as indicated by a contrary rule in the case of Adair v. Jacks, *supra*, and it is further asked to enter an order in this case similar to the one In re Potts, *supra*, so that the judgment defendants in this Orange Fuller case may be permitted to now make application for leave to file

petition for such new trial, and if this Court should hold that it is now too late to file a new petition for a new trial, it is then asked, under the peculiar circumstances of this case, and where the good faith of the United States District Court is so fully shown, as well as the injustice that will be occasioned should a writ of mandamus of this Court now issue, to grant leave to the trial court to now proceed to hear and determine the petition for new trial which was filed in such court within the said three-year period of time as if it had never been heard, so that injustice may not be done as is sought to be done by the petitioner in this proceeding.

The rule in equity with reference to granting leave to file a bill of review has never been applied so as to work an injustice. This Court has not only granted to parties leave to file bills of review, but on application of the lower courts themselves have granted to such courts the right to pass on bills previously filed without leave. *In re Potts*, leave was given the parties to file an application in this court, yet in the course of the opinion it is said: —

> "When the merits of the case have been once decided by this Court on appeal the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review."

In Romer v. Simon, 91 U. S. 149, Mr. Justice Waite said it was proper practice for the parties to

make an application in the court below, "and have that court send to us a request for the return of the record in order that it might proceed further with the cause. Should such a request be made we might, in a proper case and under proper restrictions, make the necessary order." So that if we are wrong in the proposition that no consent of this Court is necessary to the lower court entertaining a petition for a new trial under the statute in question, yet the petition having been filed within the time prescribed by the statute there is no reason why this Court cannot now grant the respondent the right to entertain and pass on said petition for a new trial and prevent the accomplishment of a judicial wrong. We earnestly contend, however, in conclusion, that no such procedure is or was necessary. We have shown that wherever statutes of this kind exist, — in Kansas, Ohio, Indiana, Kentucky, Iowa, Nebraska, New York, California, Wisconsin and Arkansas, — they have been uniformly construed as giving to the parties the right to file the petition in the lower court without leave from the appellate court which may have affirmed the judgment, and that such petitions are not considered as a review in the original case in virtue of the court's original jurisdiction, but as the institution of a new suit, requiring the service of summons, the bringing in of the parties as in other causes, the filing of pleadings and a hearing in the exercise of a new jurisdiction conferred by statute. And all of these State decisions are in exact harmony with this

Court's decisions construing a similar Federal law governing the granting of new trials in the Court of Claims.

It is not to be doubted that the public is interested in a righteous end being put to litigation and that the final judgments and decrees of courts are sacred from attack and are even beyond the reach of the legislature, but the power of the legislature to confer on the courts themselves jurisdiction to open their proceedings and vacate their judgments and decrees has never been questioned. And when such jurisdiction is conferred in plain and unambiguous terms, the courts have never declined the power as an unconstitutional grant or evaded it by a resort to an unwarranted construction. No court of justice can exercise a higher function than setting aside an unjust judgment. Courts of equity assumed this jurisdiction without legislative sanction.

Respectfully submitted,

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